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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA, INC.,

Petitioners,

v.

GEORGE JAYNES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(a) of the Rules of this Court, the Organization for International Investment and the Association of International Automobile Manufacturers respectfully submit this brief as *amici curiae* in support of Petitioners seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations with a substantial interest in the creation and enforcement of stable and predictable legal standards governing the conduct of international trade and investment.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The Association of International Automobile Manufacturers ("AIAM") is an independent business association representing the interests of international automobile companies that import or manufacture motor vehicles in the

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for either party has authored this brief in whole or in part. This brief is filed under Supreme Court Rule 37.2(a) with the consent of both parties, and copies of the letters indicating consent have been filed with the Clerk of the Court.

United States. AIAM represents manufacturers that account for approximately 30 percent of the passenger cars and light trucks sold annually in the United States. AIAM also represents original equipment suppliers and other auto-related trade associations.

Amici view the jurisdiction and venue rulings at issue in this case as a serious threat to their members' interests in a stable, predictable, and fair legal environment for foreign commerce and investment in the United States. These rulings also jeopardize the affiliates of *amici*'s members that transact business around the world. The decision below would vastly expand the exposure of *amici*'s members and their affiliates to suit in jurisdictions with which they have no contacts. It would expose *amici*'s members and their affiliates to potential "pendent" liability under the laws of every one of the 50 states, including states in which they do no business or have any contact. *Amici*'s abiding need to know with some certainty what their risks are in conducting business that has global implications provides a compelling reason for this Court to grant the petition in this case. At a minimum, *amici*'s perspective will assist this Court in evaluating the worthiness of the petition for review by the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

DaimlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc. ("Petitioners") have petitioned for certiorari from the U.S. Court of Appeals for the First Circuit's unreported order declining review of the district court's jurisdiction and venue rulings under Section 12 of the Clayton Act. That order effectively places the First Circuit in the camp of three other Circuits that have read Section 12's two parts as wholly unrelated. Two other Circuits—the District of Columbia and the Second—would have dismissed this lawsuit. Accordingly, the First Circuit has exacerbated the already deep split among the courts of appeals regarding the proper

interpretation of Section 12. Petitioners also argue that the decision below raises significant constitutional and international comity concerns that can be avoided by instead accepting the plain meaning of the statute. *Amici* agree with Petitioners' arguments and urge the Court to grant the petition for the reasons stated therein. It is simply intolerable to have the outcome of cases turn solely on the forum-shopping whims of plaintiffs or their counsel.

In this brief, *amici* in support of this Court's review offer their unique perspective on the negative consequences of both the circuit split and the judgment below for international trade with and investment in the United States. First, the circuit split poses a serious threat to the stability of the legal environment for international business. Second, the rulings below result in a vast and unwarranted expansion of both the district courts' jurisdiction and the potential liability of foreign corporate defendants under the laws of the 50 states, including states with which these entities have no contacts. Third, by so expanding this jurisdictional exposure and potential liability, the rulings below impose an unfair and disproportionate burden on foreign corporations, contrary to this Court's express policy regarding the exercise of personal jurisdiction over foreign persons and entities. These burdens threaten long-term harm not only to foreign corporate defendants but also to U.S. companies doing business abroad and to U.S. foreign policy.

ARGUMENT

The core legal issue in this case is whether Section 12 of the Clayton Act, 15 U.S.C. § 22, should be applied based on its plain meaning or, alternatively, whether the two dependent clauses of Section 12 should be torn apart and applied independently—with striking implications for venue, jurisdiction and substantive liability for defendants in antitrust actions.

Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.

The First Circuit declined to review on interlocutory appeal the district court's decision to adopt the countertextual interpretation of Section 12 adopted by the Third, Ninth and Eleventh Circuits, and to reject the contrary interpretation of the Second and District of Columbia Circuits. Pet. App. 1a. The district court here found that the phrase "in such cases" in the second clause of Section 12 refers not to cases that meet the criteria for venue set forth in the first clause, but simply to "[a]ny suit, action, or proceeding under the antitrust laws against a corporation." *Id.* at 4a-6a. The court thereby severed the connection between the jurisdictional and venue provisions under Section 12, concluding that the jurisdictional provision could be used in conjunction not only with Section 12's venue provision, but also with the broader alien venue provision under 28 U.S.C. § 1391(d). *Id.* at 6a. The latter provision states that "[a]n alien may be sued in any district." 28 U.S.C. § 1391(d). The court analyzed the jurisdiction exercised under Section 12 based on the defendants' contacts "with the United States as a whole" because jurisdiction was based on a federal statute. Pet. App. 6a-7a.

Combining the broad jurisdictional provision under Section 12 with the expansive alien venue provision permits plaintiffs to "sue an alien corporate defendant in federal court anywhere in the United States ... and serve that defendant anywhere in the world," Pet. App. 5a, subject only to a capacious "national contacts" analysis. Foreign corporate defendants that meet

the "national contacts" test could thus be haled into court anywhere in the United States, at the plaintiff's sole discretion. This result has stark negative consequences for international commerce and investment and warrants review by this Court.

I. THE CONFLICT AMONG THE CIRCUIT COURTS REGARDING SECTION 12 OF THE CLAYTON ACT THREATENS THE STABILITY OF THE LEGAL ENVIRONMENT FOR INTERNATIONAL BUSINESS.

A deep and irreconcilable conflict exists among the Circuits regarding the interpretation of Section 12 of the Clayton Act. The Third, Ninth and Eleventh Circuits have endorsed the disturbingly overbroad interpretation adopted below that permits suit against foreign corporate defendants anywhere in the United States and authorizes service of process anywhere in the world. See *Go-Video, Inc.* v. *Akai Elec. Co.*, 885 F.2d 1406, 1408-15 (9th Cir. 1989); *Action Embroidery Corp.* v. *Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1177-80 (9th Cir. 2004); *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 292-99 (3d Cir. 2004); *Delong Equip. Co.* v. *Washington Mills Abrasive Co.*, 840 F.2d 843, 848 (11th Cir. 1988).[2] In sharp contrast, the Second Circuit and the D.C. Circuit have adopted a narrower interpretation, based on the statute's plain meaning, under which the second clause of Section 12 permits worldwide service only "in such cases" where the venue requirements set forth in the first clause have been met. See *GTE New Media Servs. Inc.* v. *Bellsouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) ("The language

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[2] As Petitioners have noted, the Fourth and Tenth Circuits have similarly concluded that the worldwide service provision under Section 12 may be paired with venue provisions other than that in Section 12, although their approaches arguably are distinguishable from those of the Third, Ninth and Eleventh Circuits. Pet. 15-16; *see also Ballard* v. *Blue Shield of S. W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976); *Board of County Comm'rs* v. *Wilshire Oil Co. of Tex.*, 523 F.2d 125 (10th Cir. 1975).

of the statute is plain, and its meaning seems clear ... invocation of the nationwide service clause rests on satisfying the venue provision."); *Goldlawr, Inc.* v. *Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962). This indisputable circuit split has led to unpredictable and conflicting outcomes in the district courts. See Pet. 19-22.

The conflict and confusion among the lower courts denies businesses the ability to manage or limit risk by making deliberate decisions about where they will incorporate or transact business. The circuit conflict thus threatens the stable and predictable legal environment that is required for the operation of multinational businesses in the United States and for a healthy commercial and economic environment. *Amici*'s members reasonably depend upon predictable legal rules to operate their businesses effectively and manage their risks prudently. The disagreement among the lower courts denies them this predictable framework and creates perverse incentives to forum-shop by plaintiffs seeking to exploit the sharp differences among the lower courts in their approaches to jurisdiction and venue in antitrust cases.

The harms inherent in this unstable legal regime are exacerbated by the courts' power in most circuits to assert personal jurisdiction over "pendent" claims under state law. See, *e.g.*, *Action Embroidery Corp.*, 368 F.3d at 1180-81 (court asserting personal jurisdiction under Section 12 of Clayton Act may also assert personal jurisdiction over ancillary state law claims); see also 16 James W. Moore et al., *Moore's Federal Practice* § 108.123[2][d] (3d ed. 2004). Under the doctrine of ancillary jurisdiction, plaintiffs in federal antitrust actions may concurrently prosecute "pendent" state law claims that would otherwise have fallen beyond the limits of the applicable state long-arm statute. See *Action Embroidery Corp.*, 368 F.3d at 1180.

Defendants' potential exposure to pendent claims under state law will vary enormously depending on which of the

conflicting interpretations of Section 12 of the Clayton Act is chosen by the presiding court in a particular case. If a court takes the narrower interpretation of Section 12, then personal jurisdiction and venue will both be limited under the section's first clause to those districts in which a corporation "is an inhabitant," "may be found," or "transacts business." 15 U.S.C. § 22. Defendants thus would be subject to pendent state claims only under the laws of states in which those criteria were met. If a court takes the overbroad interpretation adopted below, however, then entities that maintain minimum "national contacts" may be haled into court anywhere in the United States and also may be subject to pendent claims under the laws of any one of the 50 states.

The circuit split thus means that businesses are unable to predict where jurisdiction and venue will be found for federal antitrust claims and, what is worse, whether they may be subject to myriad potential pendent state law claims that plaintiffs may pursue in any of the 50 states. At a minimum, this Court should grant the petition and resolve the conflict regarding Section 12 to provide businesses with certainty as to whether establishing contacts in a single U.S. state may consequently subject them to suit under the laws of all 50 states, including states in which they do no business whatsoever.

II. THIS COURT SHOULD GRANT CERTIORARI TO AVERT A VAST EXPANSION OF JURISDICTION AND LIABILITY FOR FOREIGN CORPORATE DEFENDANTS, AND TO AVOID UNFAIRLY AND DISPROPORTIONATELY BURDENING INTERNATIONAL COMMERCE.

While *amici* are gravely concerned about the existing conflict regarding jurisdiction and venue in federal antitrust law, they are even more troubled by the implications of the overbroad interpretation of Section 12 of the Clayton Act left intact by the First Circuit. This approach creates serious risks for the conduct of national and global commerce.

The interpretation of Section 12 in effect embraced by the First Circuit would vastly expand the jurisdictional power of the district courts over foreign corporate defendants in antitrust actions. Departing from Section 12's plain meaning and treating its jurisdictional and venue provisions as independent permits the pairing of Section 12's worldwide service of process provision with the nationwide alien venue provision under 28 U.S.C. § 1391(d). The troubling result is that plaintiffs "can sue an alien corporate defendant in federal court anywhere in the United States" and can "serve that defendant anywhere in the world." Pet. App. 5a. With jurisdiction subject only to the minimal protection of the "national contacts" analysis, alien corporate defendants are left without any meaningful safeguards to protect them from being haled into court in any location—and under any law—that the plaintiff may choose. Whether Congress has the power to adopt such a draconian regime is a difficult issue, but surely Congress must act more explicitly than it has in Section 12 of the Clayton Act to impose such a legal environment.

This vast expansion of the district courts' jurisdictional powers risks discouraging foreign corporations, like AIAM members and OFII members' affiliates, from pursuing or expanding their investment activities in the United States that benefit both foreign and domestic commerce. Like all business entities, these corporations carefully calibrate their business decisions and operations in each market to manage exposure to risks, including the risk of litigation. The constitutional and statutory framework governing personal jurisdiction is designed to protect persons and business entities from the unreasonable risk of litigation, particularly treble damages or punitive damage liability. See, *e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) ("The Due Process Clause ... gives a degree of predictability ... that allows potential defendants to structure their primary conduct with some minimum assurance as to

where that conduct will and will not render them liable to suit.") (citation omitted). This framework is also designed to be sensitive to the "unique burdens" placed on foreign defendants. See, *e.g., Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching ... personal jurisdiction over national borders."). The overbroad interpretation of Section 12 effectively prevents foreign companies from managing litigation risk, because minimum contacts anywhere will render them subject to suit everywhere in the United States. The disproportionate risk necessarily will discourage foreign investment in this country.

The potential exposure of foreign corporate defendants in federal antitrust actions to ancillary claims under state law presents an even greater disincentive to foreign trade and investment in the U.S. market. Under the scheme endorsed by the courts below, it would not be sufficient for a company seeking to trade or invest in one U.S. state to ensure its compliance with that state's particular business laws and regulations. Rather, it would need to allocate resources sufficient to protect against potential claims under the laws of all 50 states, even if it does business only in one. Even a minimal effort to reduce litigation risk would require a survey of the applicable state laws and precautionary measures to comply with the most onerous rules likely to be asserted by the most opportunistic or imaginative plaintiffs. The costs and risks of doing business in the United States thus would rise steeply and would serve to deter foreign companies from investing or trading in the U.S. market—to the detriment of both the domestic economy and international commerce.

The Court also should intervene in this case to forestall the imposition of unwarranted and discriminatory burdens on foreign corporations and international commerce. The overbroad interpretation of Section 12 of the Clayton Act

endorsed by the courts below would render foreign corporations much more vulnerable to suit—and to liability for remedies such as treble damages—than their domestic counterparts. The decision below severs Section 12's jurisdictional and venue provisions, permitting its jurisdictional clause to be paired with other venue provisions imported from other statutes. For alien corporations with minimum "national contacts," the result is that an action may be brought in any district court in the United States, based on the worldwide service provision in Section 12 in combination with the general venue provision that "[a]n alien may be sued in any district." 28 U.S.C. § 1391(d). For domestic corporations, however, the result of severing Section 12's two clauses is far less stark, because the applicable venue rules are more restrictive. See *id.* § 1391(b)-(c); see also *General Elec. Co.* v. *Bucyrus-Erie Co.*, 550 F. Supp. 1037, 1041 (S.D.N.Y. 1982) ("The general venue provision of section 1391 governing such domestic corporations is, in contrast to section 1391(d) governing alien corporations, *more* difficult to satisfy than the section 12 venue requirements."). Severing the clauses of Section 12 and applying alternative general venue provisions thus places foreign corporations, such as AIAM's members and OFII's members' affiliates, at a significant disadvantage vis-à-vis their domestic counterparts.

Courts embracing the broader reading of Section 12 of the Clayton Act have failed to identify a legal or policy rationale that justifies this disparate treatment of foreign corporations. They fail to explain why Section 12 should be read in a manner that is so clearly contrary to this Court's stated views concerning the exercise of personal jurisdiction over alien persons or corporations. See, *e.g.*, *Asahi Metal Indus. Co., Ltd.*, 480 U.S. at 115 ("'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field'") (citations omitted).

The courts that have adopted the overbroad reading of Section 12 not only lack an affirmative justification for

disproportionately burdening foreign corporations—they also ignore the negative repercussions of doing so for U.S. foreign policy and U.S. companies doing business abroad. What this decision simply disregards is that lack of restraint in the exercise of jurisdiction may well lead courts in other countries to retaliate, or attempt to "level the playing field," by adopting similarly expansive jurisdictional approaches. Such retaliatory actions will harm U.S. companies and the U.S. economy, and introduce friction into U.S. foreign relations.

The expansive approach to jurisdiction in the decisions below, therefore, threatens the nation's interests as a whole. See, *e.g.*, *Asahi Metal Indus. Co., Ltd.*, 480 U.S. at 115 (The Federal Government's interest in its "foreign relations policies[] will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State."). Given the split in the Circuits and the harm to foreign companies embodied in the ruling below, certiorari is plainly warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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